SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term 1968

No. 412

ROGER LEE GLAVIN and ROBERT LORING CHESNEY,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions and Statutes Involved	3
Concise Statement of Case	5
Reasons for Granting the Writ	10
1. Ruling Contrary to the Decision of This Court on Assistance of Counsel	10
2. Decision Upholding Instruction That Guilt May Be Inferred Appears to Conflict With Decision of This Court	14
3. Important Question of Law Which Should Be Settled	17
4. Additional Errors	19
A. Admission Without Foundation of Hearsay Documents	19
B. Search, Arrest Then Seizure	19
Conclusion	21
Appendix. Opinion of the United States Court of Appeals for the Ninth Circuit	App. p. 1

TABLE OF AUTHORITIES CITED

Cases

	Page
Glasser v. United States, 315 U.S. 60	10, 11, 14
Gonzales v. United States, 314 F. 2d 750	10
Griffith v. State of California, 380 U.S. 609	16
Hartzell v. U.S., 72 F. 2d 569	19
Henry v. United States, 371 U.S. 98	20
Juvera v. United States, 378 F. 2d 433	10
Lugo v. United States, 350 F. 2d 858	10
Morissette v. United States, 342 U.S. 246	14, 15, 16
United States v. Gainey, 380 U.S. 63	14, 15
Wolcher v. U.S., 200 F. 2d 493	19

Rules

Rules of the Supreme Court of the United States, Rule 22(2)	2

Statutes

United States Code, Title 18, Sec. 2	5
United States Code, Title 28, Sec. 1254(1)	2
United States Code, Title 18, Sec. 2312	4, 5
United States Code, Title 18, Sec. 2314	5
United States Code, Title 18, Sec. 3481	4
United States Code Annotated, Constitution Amendments 1-5, p. 102	4
United States Code Annotated, Constitution Amendments 1-5, p. 297	4
United States Code Annotated, Constitution Amendments 6-14, p. 4	4

Page

United States Constitution, Fourth Amendment 3

United States Constitution, Fifth Amendment 4

United States Constitution, Sixth Amendment 4

Textbook

Canons of Professional Ethics of American Bar Association, Canon 37 14

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on June 7, 1968.

Opinion Below.

The opinion of the court below in this case, the United States Court of Appeals for the Ninth Circuit, printed in Appendix hereto, *infra,* has not yet been printed in Federal Reporter.

Jurisdiction.

The judgment of the Circuit Court of Appeals was dated June 7, 1968 and entered on the same date. A petition for rehearing, filed on July 5, 1968 was denied on July 18, 1968 (Appendix *infra*).

The jurisdiction of this court is invoked under 28 U.S.C. 1254(1) and Rule 22(2) of the Rules of this Court.

Questions Presented.

1. On the matter of the right to effective assistance of counsel—or the right to represent himself—of an accused:

a. Does an accused have the right, where the request is made prior to trial, not to be represented by counsel?

b. Does an accused have the right to discharge and decline to use a privately employed counsel for a co-defendant with whom he does not agree?

c. Are the substantive rights of both accused denied and both deprived of effective assistance of counsel, where the court orders both to trial represented by one private counsel, who prior to trial informed the court that a possible conflict of interest may exist between the two, that he had been unable to agree with one of the accused as to the handling of the case, which accused did not wish to be represented by him, and asked to be relieved from representation of that defendant?

2. Is the burden of proof shifted to an accused to establish his innocence and is he denied the right to remain silent and suffer no penalty therefrom, by an instruction from the court to the effect that the jury may draw the inference and find guilt from possession of recently stolen property unless the accused satisfactorily explained the same?

3. Is the admission in evidence of police possessed tags and items relating to stolen vehicles which were

momentarily placed in the hands of a defendant (by a ruse) to arrest him without a warrant at a time when he was not in the commission of a crime (adequate time for obtaining a warrant existed) so as to use the items in evidence against him, a denial of the substantive rights of such defendant?

4. Is the admission of hearsay documents—receipt for truck parts and gasoline receipts—containing a name like that of an accused—which was not found in the possession of the accused and not identified as being related to the accused, a denial of due process?

5. Where at the instance of a civilian employee of an insurance company organization, a state police officer, without arrest, places the driver and relief driver of a truck in technical custody (the registration papers having checked out) while the civilian puts on coveralls and makes an extensive search of the vehicle, to thereafter show the officer a cab number he claims corresponds with a number phoned to him by the police as from a truck reported stolen, the parties then being placed under arrest, has there been an unlawful search and seizure warranting suppression of the papers thereafter taken from the defendant driver?

Constitutional Provisions and Statutes Involved.

1. The Fourth Amendment to the United States Constitution, which provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and

particularly describing the place to be searched, and the persons or things to be seized."

United States Code Annotated, Constitution Amendments 1 to 5, page 102.

2. The Fifth Amendment to the United States Constitution, the pertinent part of which provide:

". . . nor shall any person . . . be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property without due process of law; . . ."

United States Code Annotated, Constitution Amendments 1 to 5, page 297.

3. The Sixth Amendment to the United States Constitution, the pertinent part of which provides:

"In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense."

United States Code Annotated, Constitution Amendments 6 to 14, page 4.

4. 18 U.S.C. 3481, which provides:

"In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him."

5. 18 U.S.C. 2312 which provides:

"Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5000 or imprisoned not more than five years, or both."

6. 18 U.S.C. 2314, the pertinent provisions of which provide:

> "Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5000 or more, knowing the same to have been stolen, converted or taken by fraud; . . . Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

7. 18 U.S.C. 2, the pertinent provisions of which provide:

> "(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

Concise Statement of Case.

By indictment filed May 25, 1966, in the United States District Court, Central District of California, [typed transcript p. 2] petitioner Roger Lee Glavin was charged with violation of 18 U.S.C. Section 2312—transportation of a motor vehicle in interstate commerce knowing the same was stolen—in two counts and violation of 18 U.S.C. Section 2314—transportation of stolen merchandise (refrigerated trailer) over the value of $5,000 in interstate commerce, which was known to have been stolen . . . and petitioner Robert Loring Chesney was charged with aiding and abetting in the commission of two counts of transporting vehicles in commerce knowing them to have been stolen, this in violation of 18 U.S.C. Section 2 [typed transcript p. 2]. Each petitioner herein pleaded not guilty to each count of indictment [Minute Order 6/16/66; typed transcript p. 5].

At time for trial on June 27, 1966, and prior to the commencement thereof before the selection of a jury, counsel for petitioners herein made the following motion:

"Mr. Baumen: Your honor, it appears that there may perhaps be a conflict of interest here. I appear for both Mr. Roger Glavin and Mr. Chesney. Mr. Glavin and I have not been able to agree on my representation, and he has indicated that he does not wish me to represent him. I would, therefore, move the Court at this time to be relieved of representing Mr. Glavin." [Supp. typed transcript p. 2, lines 8-15].

The Court responded to the motion as follows:

"The Court: Well, these people are entitled to a speedy trial, and we are here this morning ready to try the case. Now I have read the file in this case and it appears these defendants have been out on bond since early in May, which has afforded them ample time to secure whatever representation they desire. So I would deny your motion Mr. Baumen and we will proceed to try the case." [Supp. typed transcript p. 2, lines 16-23].

A motion to suppress documents, papers, instruments and written data taken from petitioner Roger Lee Glavin by Police Officers and Highway Patrolmen about May 2, 1966, upon the ground that such documents were taken as a result of an unlawful search and seizure claiming that the documents were seized without a warrant and prior to defendant being arrested and that no reasonable or probable cause existed for search or arrest, was made on June 27, 1966 [Clk. typed transcript p. 11].

The motion was heard on June 28, 1966, and denied [Rep. typed transcript pp. 98-128].

The documents were admitted into evidence over objections as government's Exhibit 12E (13 receipts) [Rep. typed transcript p. 422]; Exhibit 12L (driver's log book) [Rep. typed transcript p. 431, line 7, to p. 432, line 7]; Exhibit 12M (driver's log book) [Rep. typed transcript p. 434, line 3, to p. 435, line 7].

The Court also admitted in evidence as government Exhibit 9A a document found in a truck in the possession of Leon Glavin, co-defendant, which document purported to be a receipt for a truck part to an entity "Chesney Trk" over objection of defendant Chesney as to hearsay and not connected up with him in any manner [Rep. typed transcript p. 343, line 18].

The case was tried before a jury from June 27, 1966, through June 30, 1966 [Clk. typed transcript, Minute Order pp. 6, 19, 20 and 21].

At the conclusion of the government case, the following motions were made by counsel for the petitioners herein:

(a) A motion to strike the evidence which had been subject to the motion to suppress [Rep. typed transcript p. 545];

(b) A motion on behalf of petitioner Chesney herein to strike Exhibit 9A which was a receipt for a truck part made to "Chesney Trk" and not taken from Chesney nor connected up with him; [Rep. typed transcript pp. 545 and 546];

(c) A motion on behalf of petitioner Chesney herein to strike government's Exhibits 14G, H and I on

the claim of partial entrapment and nonpossession by Chesney [Rep. typed transcript p. 546, line 14, to p. 554, line 5]; and

(d) A motion for judgment of acquittal on behalf of petitioner Chesney herein all of which motions were denied [Rep. typed transcript p. 554, lines 3-15].

Objections were then made to the Court as to a proposed jury instruction which objection was denied [Rep. typed transcript p. 562, line 10, to p. 566, line 11]. The Court gave the instruction the pertinent parts of which are:

"Possession of property recently stolen, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find, in the light of surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen.

"And, possession of property recently stolen, if not satisfactorily explained is also ordinarily a circumstance from which the jury may reasonably draw the inference and find, in the light of surrounding circumstances shown by the evidence in the case, that the person in possession not only knew it was stolen property, but also participated in some way in the theft of the property . . .

"If the jury should find beyond reasonable doubt from the evidence in the case that the International tractor described in Count 1 of the indictment were stolen, and that while recently stolen, the property was in the possession of one of the

accused, the jury would ordinarily be justified in drawing from those facts the inference, not only that the International Tractor was possessed by the accused with knowledge that the property was stolen, but also that the accused participated in some way in the theft of the property, unless possession of the recently stolen property by the accused is explained to the satisfaction of the jury by the facts and circumstances and the evidence in the case; and the same proviso applies in the case of the tractor in Count II." [Rep. typed transcript p. 596, line 20, to p. 598, line 10].

An exception was taken to such instruction [Rep. typed transcript p. 604, line 12, to p. 605, line 14].

The jury returned a verdict of guilty as to each of the petitioners herein as to each charge count charged and thereafter a motion for judgment of acquittal and motion for a new trial were filed on behalf of both petitioners both of which were denied [Rep. typed transcript p. 608, line 1, to p. 609, line 8 and Clk. typed transcript pp. 24, 26 and 29].

Sentences were then pronounced as to each of the petitioners here in sentencing each of them to five years in prison as to each count. Such judgments were filed July 12, 1966 [Clk. typed transcript pp. 30 and 21].

Both petitioners appealed and the Appellate Court rendered its judgment on June 7, 1968 affirming the Court below (Case No. 21374—the decision has not been printed in the Reports as yet).

A petition for rehearing was timely filed and thereafter denied on July 18, 1968.

Reasons for Granting the Writ.

1. Ruling Contrary to the Decision of This Court on Assistance of Counsel.

The decision of the Court of Appeals in the instant case appears to be in conflict with the decision of this Court in the case of

Glasser v. United States, 315 U.S. 60 (1942).

Rather than follow and apply the rule in that case it appears that the Court of Appeals herein has laid down technical and onerous conditions for its application which has the effect of either changing the rule (as to Ninth Circuit cases) or denying its application except on meeting the additional requirement which have been set up by the Court of Appeals.

It has been 26 years since the decision of this Court in the *Glasser* case. There have been a number of cases in this circuit which seem to skirt the rule laid down therein regarding assistance of counsel, including

Juvera v. United States, 378 F. 2d 433 (1967);

Lugo v. United States, 350 F. 2d 858 (1965); and

Gonzales v. United States, 314 F. 2d 750 (1963).

The facts in none of those cases are as strong for the application of the *Glasser* case rule as exists here and in the present case it appears that the Court has taken a long step away from the rule itself. It also appears that Appeal Courts in other circuits have set up certain guide lines when the rule in the *Glasser* case is declared not to be applicable which may have the effect at nibbling away at the rule itself.

In the light of the many clarifications which this Court has made in the past decade regarding the Constitutional rights of persons accused of crime and in the light of the nibbling away at the rule in the *Glasser* case by the Circuit Courts the matter should be settled by this Court to spell out the applicability and non-applicability of the rule in situations where it is claimed that there was a conflict of interest between several accused represented by one counsel.

In the *Glasser* case, one counsel represented two defendants. The Court was advised that the possibility that conflicting interest might arise which would diminish the attorney's usefulness to Glasser (315 U.S. p. 76). This Court held that it was error for the lower court, with this knowledge, to have permitted the one counsel to continue to repesent the two defendants and that Glasser was denied his right to have the effective assistance of counsel guaranteed by the Sixth Amendment.

This Court in the *Glasser* case (315 U.S. at p. 75) stated:

> "There is yet another consideration. Glasser wished the benefit of the undivided assistance of counsel of his own choice. We think that such a desire on the part of an accused should be respected. Irrespective of any conflict of interest the additional burden of representing another party may conceivably impair counsel's effectiveness."

and at 315 U.S. page 76, the Court further stated:

> "The right to have the assistance of counsel is too fundamental and absolute to allow Courts to indulge in nice calculations as to the amount of prejudice arising from its denial. . . . Of equal im-

portance with the duty of the Court to see that an accused has the assistance of counsel is its duty to refrain from embarrassing counsel and the defense of an accused by insisting, or indeed, even suggesting that counsel undertake to concurrently to represent interests which might diverge from those of his first client, when the possibility of that divergence is brought home to the court."

In the present case, prior to commencement of trial and at the first opportunity before the Court (who had been assigned to this district from the state of Washington to try the case) counsel for the two appellants herein stated:

"Your honor, it appears there may perhaps be a conflict of interest here. I appear for both Mr. Roger Glavin and Mr. Chesney. Mr. Glavin and I have not been able to agree on my representation, and he has indicated that he does not wish me to represent him. I would, therefore, move the Court at this time to be relieved of representing Mr. Glavin." [Supp. typed transcript p. 3, lines 8-15].

The Court does not challenge or dispute the existence of the conflict of interest but summarily denied the motion in the interest of expediency and directed that the trial commence.

The Appellate Court has engaged in nice calculations as to the meaning of the expressions used stating that they suggested rather than a conflict of interest the problem that one of counsel's two clients were dissatisfied with him and wished to replace him.

Also, the Appellate Court in this decision commented that counsel had represented Roger Glavin for at least

three weeks and the motion was presented on the day set for trial.

It was pointed out to the Court on the oral argument in the presence of the counsel for the government who tried the case that it was not until Friday night, before the trial on Monday that counsel was afforded the oportunity to inspect all of the exhibits proposed to be used and thus it was only on the week-end before trial that counsel was able to confront the accused with all of the facts and demand answers and suggest certain procedures for handling of the case for each of the defendants. Mr. Glavin did not agree and it appeared that the interests of Mr. Glavin and Mr. Chesney would conflict. Mr. Chesney wanted to take the witness stand and testify. This was immediately brought to the attention of the trial court on the first available court day and prior to trial. The result of this denial was that one attorney was forced to represent two defendants, one of whom should have taken the witness stand and testified but whose testimony would have been highly detrimental to the other defendant as a result of which the matter had to be compromised and neither defendant took the witness stand thereby resulting in ineffective representation of both defendants.

The essence of the Appellate Court decision herein is that merely advising the Court of the possible conflict of interest, that the defendant and the attorney cannot agree on the handling of the case and that one of the accused does not wish that attorney to represent him is not enough. The decision implies that in this situation where the Court has denied the motion that lawyer for the defendants with the conflicting interests must risk the anger of the Court by coming forward and in

open Court laying bare the confidential details given him by each of the accused to display on the record the details of such conflict, however detrimental it may be to his client, or else the accused are forever barred from raising such a claim. Is the *Glasser* case rule to be qualified and limited by such restrictions? How much disclosure of the intimate details by the client must be given to the Court in order to obtain the benefit of the *Glasser* case rule where such conflict does actually exist?

It appears that these limitations placed by the Appellate Court are unreasonable and without merit. Under the decisions in the California State Courts, where the counsel practices, it is held to be improper for an attorney representing defendants where a conflict does occur to disclose the facts of the same as this would violate his duty to preserve his client's confidence and would be contrary to Canon 37 of Canons of Professional Ethics of the American Bar Association.

2. Decision Upholding Instruction That Guilt May Be Inferred Appears to Conflict With Decision of This Court.

The decision of the Appellate Court in the instant case appears to conflict with the intent and reasoning in the decision of this Court in

Morissette v. United States, 342 U.S. 246 (1952).

(It likewise seems that the dissenting opinion in the decision of this Court

United States v. Gainey, 380 U.S. 63

would be applicable to the facts herein.)

In the *Morissette* case, the defendant was charged with stealing some bomb castings from a government bombing range, admitted that he took them but testified that he thought that they were abandoned and that he did not intend to steal them. Whereupon the Court instructed the jury that felonious intent could be presumed from defendant's act of taking the item. This Court held that such instruction was erroneous and that such incriminating presumptions are not to be improvised by the judiciary.

In the instant case the trial court instructed the jury:

> "and possession of property recently stolen if not satisfactorily explained, is ordinarily a circumstance from which *the jury may reasonably draw the inference* and find in the light of surrounding circumstances shown by the evidence in the case, that the person in possession not only knew it was stolen property, but also participated in some way in the theft of the property . . ." (emphasis added).

Counsel for the accused strongly opposed the giving of such instructions and urged on the Court that it shifted the burden of proof as to innocence to them and denied them the constitutional right to remain silent and suffer no penalty therefrom.

The Appellate Court disagreed holding that the jury was instructed to do no more than accord to the evidence, if unexplained, its natural probative force, citing the case of

United States v. Gainey, 380 U.S. 63 (1965).

The *Gainey* case was one involving an inference declared by statute and would appear factually to have no applicability herein.

Moreover, this Court in the case of:

Griffith v. State of California, 380 U.S. 609 at page 614 stated:

> "What the jury may infer given no help from the Court is one thing. What it may infer when the Court solemnizes the silence of the accused into evidence against him is quite another."

Also at 380 U.S. on page 615, the Court stated:

> ". . . The Fifth Amendment, in its direct application to the Federal Government, and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the Court that such silence is evidence of guilt."

The Appellate Court states that since other instructions were given that no inference can be drawn from the fact that the defendant did not testify that the instruction to the effect that the jury could infer guilt from possession of property unless the defendant explained it was a proper one.

Of two conflicting instructions, one that you could infer guilt from possession unless the defendants explained the same and the other that there was a presumption of innocence and you should not infer guilt from failure to testify, which would the jury follow? One appears to be specific, the other general and in the common course of things it appears here that the Court has given help to the jury in arriving at a determination of guilt to the detriment of the defendant and contrary to the rule laid down in the decision of this Court in *Morissette v. United States, supra.*

3. Important Question of Law Which Should Be Settled.

The decision of Court of Appeals in the instant case rules on an important question of Federal Law which has not been but should be settled by this Court as it lies in the shadows of several rules.

To capsule the facts, a government witness, Buehler, testified that he had been arrested along with the brother of petitioner Glavin herein in connection with a stolen truck; that Mr. Chesney telephoned to inquire what happened and he told him that Glavin's brother had been arrested but he had been released; Mr. Chesney informed him that petitioner Glavin was in town but did not want to go to his brother's place and that there was a package containing tags and papers at petitioner Glavin's brother's house which he would like to be able to pick up and deliver to him.

Buehler picked up the package and turned it over to the Police who took it to the Police lab and photographed it and spent considerable time cataloging the same and returned it to Mr. Buehler with instructions to deliver it to Mr. Chesney. Mr. Chesney was not at his place of business and the Police told Mr. Buehler to call him at home and set up a meeting. This Mr. Buehler did. When Mr. Chesney arrived Mr. Buehler put the package in his hands and the Police and FBI arrested him simultaneously. Mr. Chesney never opened the package and there was no other evidence connecting him with the transaction.

It was objected to that this was in the nature of an entrapment procedure, that the defendant was not committing any crime at the time that the event occurred, that if the police believed that he were guilty

of crime they had adequate time to have secured warrants and that the placing of the package in his hand momentarily and arresting him simultaneously therefor was used solely for the purpose of utilizing the not-known-to-the defendant contents of the package in evidence against him.

The Court of Appeals in this case held that this was proper. If the material placed in Mr. Chesney's hands were contraband, were narcotics or an item which the possession of it in and of itself constituted a crime some basis for the ruling could be reasoned. Moreover, if Chesney were in the course of the commission of a crime at the time of this police-set-up then again reason would indicate that the arrest was proper and possibly the use of the then unknown contents of the package against him. However, this was a police set up renewed and initiated by the police after the original contact with Chesney had been broken off. It was their show. We have, therefore, not so much search and seizure but a situation of long possessed, police controlled evidence planted on a defendant—the possession of which was not a crime—for the sole purpose of using it against him to indicate guilt for a crime for which he was not then arrested.

Is subterfuge and deceit in evidence to become a part of a judicial process? If not, then this is a field and an area in which this Court should lay down clear guidelines for the Courts to follow to prevent the utilization of such a subterfuge—the subterfuge was on the jury—to obtain a conviction. Such a situation herein was doubly detrimental when the defendant was hampered by an attorney with divided interest and could not take the stand to testify in his own behalf.

4. Additional Errors.

While perhaps these do not have the scope to bring them fully within the considerations laid down by this Court governing review on certiorari, there are two additional points which are urged to have been error on the part of the Appellate Court in the instant case.

A. Admission Without Foundation of Hearsay Documents.

The trial court admitted in evidence without connecting up to the defendant Robert Chesney an invoice for sale of a truck part, found in one of the stolen vehicles to "Chesney Trk." The Court also admitted a number of receipts and memorandum of delivery bearing a credit card imprint in the name "Robert L. Chesney." The Appellate Court indicated that there was some risk that the jury might take the documents as proof of the facts which they purported to record but the task of balancing the probative values against probative dangers rested with the judge.

The Court apparently passed over the matter of connecting up the same with Mr. Chesney or some foundation tying him to the documents.

A private writing, document or paper can only be admitted where there is extensive proof of identity and genuineness as the writing does not prove itself.

Hartzell v. U.S. CCA, (Iowa), 72 F. 2d 569.

In order to introduce in evidence a paper or document connecting up a defendant or against a defendant, some foundation must be laid showing that connection.

Wolcher v. U.S., (Ninth Circuit) 200 F. 2d 493.

B. Search, Arrest Then Seizure.

Defendant, Roger Glavin, and a driver, at the instance of a civilian employee of the National Theft Agency, an insurance company sponsored organization, were held in technical custody by a highway patrol officer while the civilian put on coveralls and made an extensive search of the vehicle. After such search he showed the officer a number which he claimed he had received by phone from the Police in Los Angeles. Roger Glavin was then placed under arrest and his documents and papers in the truck were seized.

A Motion to Suppress was denied. The Appellate Court held that the trial Court was proper in its ruling. The question is a close one but a careful reading of the transcript disclosed clearly that while the defendant was being held in technical custody such an extensive search was undertaken, tests, etc., that the civilian had to put on coveralls to conduct the same.

The police officer testified that the registration papers checked out. Therefore, any reasonable or probable cause for inspection had passed when the search began which search was followed by an arrest.

It was urged on the Appellate Court below that this situation was squarely within the rule of

Henry v. United States, 371 U.S. 98.

The Court did not agree, ruling there was probable cause.

It is urged that no probable cause existed, that the registration checked out, that the search itself was purely exploratory and that the arrest was the result of what the exploration purported to reveal.

Conclusion.

In order to settle important questions of Federal law not now settled, and in order to lay down guide lines as to what initial showing a defendant or his attorney must make to the Court where it is claimed that a conflict of interest exists between two accused represented by the same counsel, and in order to clarify whether a Court may indirectly comment on the failure of a defendant to testify by instructing the jury that they may infer and find guilt from possession of recently stolen property unless the defendant explains the same and for the other reasons set forth herein it is respectfuly urged that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

G. G. BAUMEN,
Counsel for Petitioners,